



भारत का राजपत्र The Gazette of India

सी.जी.-डी.एल.-सा.-26122022-241410
CG-DL-W-26122022-241410

प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY
साप्ताहिक
WEEKLY

सं. 25] नई दिल्ली, दिसम्बर 11—दिसम्बर 17, 2022, शनिवार/अग्रहायण 20—अग्रहायण 26, 1944
No. 25] NEW DELHI, DECEMBER 11—DECEMBER 17, 2022, SATURDAY/AGRAHAYANA 20—AGRAHAYANA 26, 1944

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह पृथक संकलन के रूप में रखा जा सके
Separate Paging is given to this Part in order that it may be filed as a separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)
PART II—Section 3—Sub-section (iii)

केन्द्रीय अधिकारियों (संघ राज्यक्षेत्र प्रशासनों को छोड़कर) द्वारा जारी किए गए साधारण आदेश और अधिसूचनाएं
Orders and Notifications issued by the Central Authorities (Other than the Administrations of Union Territories)

भारत निर्वाचन आयोग
आदेश

नई दिल्ली, 14 दिसम्बर, 2022

आ. अ. 255.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, भारत निर्वाचन आयोग एतद्वारा वर्ष 2019 की निर्वाचन याचिका संख्या 6 में बम्बई उच्च न्यायालय, नागपुर बेंच, नागपुर के निर्णय/आदेश दिनांक 25/11/2019 को प्रकाशित करता है।

[फा. सं. 82/महा.-लो.स./6/2019 (नागपुर)]

आदेश से,
एस. के. दास, सचिव

ELECTION COMMISSION OF INDIA**ORDER**

New Delhi, the 14th December, 2022

O.N. 255.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951) the Election Commission of India hereby publishes the judgment/order dated 25/11/2019 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Election Petition No. 6 of 2019.

[F. No. 82/MT-HP/6/2019 (Nagpur)]

By Order,
S. K. DAS, Secy.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
NAGPUR BENCH. NAGPUR.**

ELECTION PETITION NO. 06 OF 2019

Dr. Rameshkumar Bapuraoji Gajbe,
Aged 66 years, Occupation - Doctor,
R/o Bhis, Tq. - Chimur, District -
Chandrapur - 442903.

.... PETITIONER**VERSUS**

1. The Election Commission of India,
through its Chairman, having o/a
Nirvachan Bhavan, Ashoka Bhavan,
New Delhi.
2. Returning Officer,
having his office at Collectorate,
Gadchiroli.
3. Mr. Ashok Mahadeo Nete,
R/o Ward No.23, Chamorshi Road,
Tq. District Gadchiroli.

.... RESPONDENTS

Shri N.B. Rathod, Counsel for the petitioner,
Ms. Neerja Chaubey, Counsel for respondent 1,
Shri Sumant Deopujari, Government Pleader for respondent 2,
Shri Sunil Manohar, Senior Counsel assisted by Shri Atharva S.
Manohar and Mrs. Prajakta S. Chaudhari, Counsel for respondent 3.

CORAM : ROHIT B. DEO. J.**DATE OF RESERVING THE JUDGMENT : 03-10-2019****DATE OF PRONOUNCING THE JUDGMENT : 25-11-2019****JUDGMENT:**

1. The petitioner, who contested the election to the 17th Lok Sabha from the Gadchiroli-Chimur Constituency as the candidate of the Vanchit Bahujan Aghadi, and lost the electoral battle, is seeking a declaration that the election of respondent 3 is null and void for "non-compliance with the laws".
2. Respondent 3, who is declared elected, is seeking rejection of the election petition on the premise that the petition, even if the averments therein are taken at face value, fails to disclose cause of action and entails rejection in view of the provisions of Sections 83(1), 86(1) and 100(1)(d)(iv) of the Representation of the People Act, 1951 ("Act" for short) and Order VII Rule 11 (a) of the Civil Procedure Code ("Code" for short).
3. It would not be necessary to consider the plethora of decisions which enunciates the scope of Order VII Rule 11(a) of the Code since the learned Counsel representing the combatants are in unison in the submission that the Court is obligated to reject the plaint if on a meaningful and holistic consideration of the plaint averments, and assuming the

avermments to be true, a clear right to sue or cause of action is not discernible. It would be apropos to have a bird's-eye view of the averments in the petition to ascertain whether a cause of action is disclosed.

4. Paragraph 5 of the petition avers that of the 15,80,070 registered voters 11,42,636 cast votes. The petitioner secured 1,11,468 votes and the Bhartiya Janta Party sponsored candidate-respondent 3 secured 5,19,968 votes. Paragraph 5 of the petition reads thus :

"In the loksabha constituency of the Gadchiroli-Chimur Loksabha there were 15,80,070 registered voters. Of which 11,42,636 polled their votes. Petitioner according to the Respondent No.2 fared 1,11,468 votes, whereas the Respondent No.3 sponsored by Bhartiya Janta Party fared 5,19,968 votes. However the final tally of the votes does not match and there is serious discrepancy in the grand total. There is difference of 62 votes less than the votes polled."

- 4.1] Paragraph 6 of the petition reads thus :

"In such circumstances, it was mandatory for the Respondent No.2 to match the tally between the votes recorded in accordance with form 17C and votes counted. Only after such tally matches without any error, could the Respondent No.2 have proceeded further. However without following the specific orders for the Respondent No.1, Respondent No.2 issued certificate to the Respondent No.3, leaving behind serious lacunae which makes the whole election redundant and vitiated.

- 4.2] In paragraph 7 of the petition, the averment is that respondent 2-Returning Officer (RO) is responsible for the safe custody of the Electronic Voting Machine (EVM) and the fact that there is serious difference in the number of polled votes and counted votes would suggest that respondent 1-The Election Commission of India (ECI) and respondent 2-RO have committed corrupt practice.

- 4.3] In paragraph 8 of the petition, the averment is that the certificate is issued in contravention of the provisions and is liable to be declared illegal and void.

- 4.4] In paragraph 9, the averment is that in the teeth of the unexplained discrepancy in the votes polled and the votes counted EVM cannot be trusted and fresh poll be conducted with the aid of ballot papers.

- 4.5] Paragraph 10 of the petition avers that in view of the directions of the ECI, it was mandatory for the RO to refrain from proceeding further and to refer the issue to the ECI.

- 4.6] In paragraph 11, the petitioner has reproduced instruction 15.30(d) of the Handbook for Returning Officer issued by the ECI to substantiate the contention that the issue of the discrepancy in the polled votes and counted votes ought to have been referred by the RO to the ECI. Paragraph 11 reads thus :

"It would be necessary to quote here the extant provision under which, Respondent Returning Officer was restrained from proceeding further.

"15.30(d). In case, total votes polled in the machine(s) does not tally with the total votes polled mentioned in the Form 17-C, the matter should be referred by the Returning Officer to the Commission for its decision and action may be taken as per the direction of the Commission. In such a case, the Returning Officer and Observer should also send a detailed report to the Commission in the format mentioned at Annexure-B below, where the margin of vote between the candidates having highest vote and the runner up is more than the votes polled in the Control Unit in question. The Returning Officer and Observer should also send a detailed report to the Commission in the format at Annexure C below, where the margin of vote between the candidates having highest vote and the runner up is less than the votes polled in the Control Unit in question."

Thus it is clear that once a discrepancy is noted in the votes polled and votes counted, it has to be sent to the election commission. However no such action has been taken in the instant case, making it completely dubious inspiring no confidence either of people or of this petition."

- 4.7] Paragraphs 12 to 18 of the petition is a discourse on the effect of the EVM on the sanctity and purity of electoral process. The grounds are set out in paragraphs 19 to 29 and the pivotal submission is that the election is liable to be declared null and void in view of the failure of the RO to act in consonance with the guidelines issued by the Election Commission. The submission is premised on the discrepancy between the votes polled and votes counted and the failure of the RO to refer the issue to the ECI.

- 4.8] The prayer clause reads thus :

"40. That in the circumstances as above the Hon'ble Court may kindly be pleased to :

- a. Declare election of the Respondent No.3 namely Ashok Mahadeo Nete from Gadchiroli-Chimur Constituency to 17th Lok-Sabha to be null and void, for non compliance with the laws, and therefore also declare that the certificate issued to the Respondent No.3 in form 22 u/ r 66 to be null and void and thus also pass all

consequential orders as would be necessary to do complete justice.

- b. During the pendency and final hearing of this petition, direct suspension/withdrawal of the certificate issued to respondent No.3 under rules 64 in form 22 of the rules.
- c. As to cost."

5. It would be apposite to analyze the relevant statutory provisions, and the judicial exegesis thereof, on the anvil of which, the question arising shall have to be answered.
6. Part VI of the Act comprises V Chapters. Chapter II deals with presentation of the election petitions and Section 80 thereof mandates that no election shall be called in question except by an election petition presented in accordance with the provisions of this Part.
7. It is well settled that right to be elected is neither a fundamental right nor a common law right. An election dispute is not an action at law or in equity and is a statutory proceedings regulated and governed by the Act. The Court would be loath to interfere with the election result lightly and would insist that the election petition strictly observes the statutory requirements.
8. In **Jagan Nath vs. Jaswant Singh and others**, AIR 1954 SC 210, the Constitution Bench of the Hon'ble Supreme Court observes thus :

"7. The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however has any application if the special law itself confers authority on a tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it.

It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence, or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected".

9. In **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and Another**, (2014) 5 SCC 312, the relevant observations read thus :

"13. It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and the courts have a duty to enforce the same with all rigorous and not to minimize their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute. The result announced by the Returning Officer leads to formation of a government which requires the stability and continuity as an essential feature in election process and therefore, the counting of ballots is not to be interfered with frequently. More so, secrecy of ballot which is sacrosanct gets exposed if re-counting of votes is made easy. The court has to be more careful when the margin between the contesting candidates is very narrow. "Looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots must be avoided, as it may tend to a dangerous disorientation which invades the democratic order by providing scope for reopening of declared results". However, a genuine apprehension of miscount or illegality and other compulsions of justice may require the recourse to a drastic step."

10. Section 81 of the Act reads thus :

"81. Presentation of petitions.- (1)An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of section 100 and section 101 to the [High Court] by any candidate at such election or any elector [within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one

returned candidate at the election and the dates of their election are different, the later of those two dates].

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

1[*****]

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition 3[***], and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]"

11. A pivotal provision in the context of the issue involved is Section 83 of the Act which reads thus :

"83. Contents of petition. — (1) An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies;
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]"

12. Section 86 of the Act which is the opening section in Chapter III dealing with trial of election petitions obligates the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act and reads thus:

"86. Trial of election petitions.—(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80-A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.—For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial."

13. Section 100 of the Act sets out the grounds for declaring election to be void and reads thus :

"100. Grounds for declaring election to be void.—[(1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act [or the Government of Union Territories Act, 1963] or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate [by an agent other than his election agent], or (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, [the High Court] shall declare the election of the returned candidate to be void.]

[(2)] If in the opinion of [the High Court], a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice [***] but [the High Court] is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and [without the consent], of the candidate or his election agent;

[* * * * *]

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt [***] practices at the election; and

(d) that in all other respects the election was free from any corrupt [***] practice on the part of the candidate or any of his agents,

then [the High Court] may decide that the election of the returned candidate is not void."

14. Section 83 of the Act mandates that the election petition shall contain a concise statement of the material facts on which the petition relies, and further necessitates the disclosure of full particulars of any corrupt practice that the petitioner alleges. It is well settled that failure to state even a single material fact may entail dismissal of the petition. Every fact which shall have to be proved to formulate a complete cause of action is a material fact. In essence, the material facts are the entire bundle of facts which would constitute a cause of action and which facts would have to be established by the petitioner to be entitled to the relief claimed. The difference between material facts and material particulars is explained by the Hon'ble Supreme Court in **Samant N. Balkrishna And Another vs. George Fernandez And Others, 1963(3) SCC 238** thus :

"29. Having dealt with the substantive law on the subject of election petitions we may now turn to the procedural provisions in the Representation of People Act. Here we have to consider Sections 81, 83 and 84 of the Act. The first provides the procedure for the presentation of election petitions. The proviso to sub-section alone is material here. It provides that an election petition may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101. That as we have shown above creates the substantive right Section 83 then provides that the election-petition must contain a concise statement of the material facts on which the petitioner relies and further that he must also set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. Thus material facts will mention that a statement of fact (which must be set out) was made and it must be alleged that it refers to the character and conduct of the candidate that it is false or which the returned candidate believes to be false or does not believe to be true and that it is calculated to prejudice the chances of the petitioner. In the particulars the name of the person making the statement, with the date, time and place will be mentioned. The material facts thus will show the ground of corrupt practice and the complete

cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficiency of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be co-related to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the making of a false statement. That statement must appear and the particulars must be full as to the person making the statement and the necessary information. Formerly the petition used to be in two parts. The material facts had to be included in the petition and the particulars in a schedule. It is inconceivable that a petition could be filed without the material facts and the schedule by merely citing the corrupt practice from the statute. Indeed the penalty of dismissal summarily was enjoined for petitions which did not comply with the requirement. Today the particulars need not be separately included in a schedule but the distinction remains. The entire and complete cause of action must be in the petition in the shape of material facts, the particulars being the further information to complete the picture. This distinction is brought out by the provisions of Section 86 although the penalty of dismissal is taken away. Sub-section (5) of that section provides:

"(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

The power of amendment is given in respect of particulars but there is a prohibition against an amendment "which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition." One alleges the corrupt practice in the material facts and they must show a complete cause of action. If a petitioner has omitted to allege a corrupt practice, he cannot be permitted to give particulars of the corrupt practice. The argument that the latter part of the fifth sub-section is directory only cannot stand in view of the contrast in the language of the two parts. The first part is enabling and the second part creates a positive bar. Therefore, if a corrupt practice is not alleged, the particulars cannot be supplied. There is, however, a difference of approach between the several corrupt practices. If for example the charge is bribery of voters and the particulars give a few instances, other instances can be added; if the charge is use of vehicles for free carriage of voters, the particulars of the cars employed may be amplified. But if the charge is that an agent did something, it cannot be amplified by giving particulars of acts on the part of the candidate or vice versa. In the scheme of election law there are separate corrupt practices which cannot be said to grow out of the material facts related to another person. Publication of false statements by an agent is one cause of action, publication of false statements, by the candidate is quite a different cause of action. Such a cause of action must be alleged in the material facts before particulars may be given. One cannot under the cover of particulars of one corrupt practice give particulars of a new corrupt practice. They constitute different causes of action."

15. In **Ram Sukh vs. Dinesh Aggarwal, (2009) 10 SCC 541**, the Three Judge Bench decision in Samant N. Balkrishna And Another vs. George Fernandez And Others is considered and the exposition of the Supreme Court of the distinction between "material facts and full particulars", reads thus :

"12. It is evident that controversy in this appeal lies in a narrow compass. It revolves around the ambit of Section 83 of the Act. The point for consideration is whether the election petition lacked "material facts" required to be stated in the election petition in terms of Section 83(1) of the Act and if so, could it be dismissed summarily without trial ? As already noted, it is mandatory that all "material facts" are set out in an election petition and it is also trite that if material facts are not stated in the petition, the same is liable to be dismissed on that ground alone. Therefore, the question is as to whether the election petitioner had set out "material facts" in his petition?

13. The phrase "material facts" has neither been defined in the Act nor in the Code and therefore, it has been understood by the courts in general terms to mean the entire bundle of facts which would constitute a complete cause of action. In other words, "material facts" are facts upon which the plaintiff's cause of action or defendant's defence depends. (See: Mahadeorao Sukaji Shivankar Vs. Ramaratan Bapu). Broadly speaking, all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or defence by the defendant are "material facts". Material facts are facts which, if established, would give the

petitioner the relief asked for. But again, what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down".

14. The requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure with reference to Sections 81, 83 and 86 of the Act came up for consideration before a three-Judge Bench of this Court in *Samant N. Balkrishna Vs. George Fernandez*. Speaking for the three-Judge Bench, M. Hidayatullah, C.J., inter-alia, laid down that:

- (i) Section 83 of the Act is mandatory and requires first a concise statement of material facts and then the fullest possible particulars;
- (ii) omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad;
- (iii) the function of particulars is to present in full a picture of the cause of action and to make the opposite party understand the case he will have to meet;
- (iv) material facts and particulars are distinct matters-material facts will mention statements of fact and particulars will set out the names of persons with date, time and place and
- (v) in stating the material facts it will not do merely to quote the words of the Section because then the efficacy of the material facts will be lost.

15. At this juncture, in order to appreciate the real object and purport of the phrase "material facts", particularly with reference to election law, it would be appropriate to notice distinction between the phrases "material facts" as appearing in clause (a) and "particulars" as appearing in clause (b) of sub-section (1) of Section 83. As stated above, "material facts" are primary or basic facts which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. "Particulars", on the other hand, are details in support of the material facts, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Unlike "material facts" which provide the basic foundation on which the entire edifice of the election petition is built, "particulars" are to be stated to ensure that opposite party is not taken by surprise.

16. The distinction between "material facts" and "particulars" and their requirement in an election petition was succinctly brought out by this Court in *Virender Nath Gautam Vs. Satpal Singh* wherein C.K. Thakker, J., stated thus: (SCC pp.631-32, para 50).

"50. There is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the facts or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue."

16. Section 86 of the Act which deals with trial of election petitions provides that the High Court shall dismiss election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act. Section 86 makes no reference to Section 83(1) of the Act which mandates that an election petition shall contain a concise statement of the material facts on which the petitioner relies. However, in the context of the interplay between Section 83(1) and Section 86 of the Act and the provisions of Order VI Rule 16 and Order VII Rule 11 of the Code, it is trite law that an election petition which is bereft of material fact/s would entail dismissal at the threshold on the premise that omission of a single material fact would lead to incomplete cause of action and that such petition is not an election petition at all. In *Ram Sukh vs. Dinesh Aggarwal*, the interplay between the provisions of the Act and the Code is considered thus :

"17. Now, before examining the rival submissions in the light of the aforesaid legal position, it would be expedient to deal with another submission of the learned counsel for the appellant that the High Court should not have exercised its power either under Order VI Rule 16 or Order VII Rule 11 of the Code to reject the election petition at the threshold. The argument is twofold viz.

That even if the election petition was liable to be dismissed ultimately, it should have been dismissed only after affording an opportunity to the election petitioner to adduce evidence in support of his allegation in the petition, and

- (ii) since Section 83 does not find a place in Section 86 of the Act, rejection of the petition at the threshold would amount to reading into sub-section (1) of Section 86 an additional ground.

In our opinion, both the contentions are misconceived and untenable.

18. Undoubtedly, by virtue of Section 87 of the Act, the provisions of the Code apply to the trial of an

election petition and, therefore, in the absence of anything to the contrary in the Act, the court trying an election petition can act in exercise of its power under the Code, including Order VI Rule 16 and Order VII Rule 11 of the Code. The object of both the provisions is to ensure that meaningless litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the courts. If that is so in matters pertaining to ordinary civil litigation, it must apply with greater vigour in election matters where the pendency of an election petition is likely to inhibit the elected representative of the people in the discharge of his public duties for which the Electorate have reposed confidence in him. The submission, therefore, must fail.

19. Coming to the second limb of the argument viz., absence of Section 83 in Section 86 of the Act, which specifically provides for dismissal of an election petition which does not comply with certain provisions of the Act, in our view, the issue is no longer res-integra. A similar plea was negated by a three-Judge Bench of this Court in *Hardwari Lal Vs. Kanwal Singh*, wherein speaking for the Bench, A.N. Ray, J. (as His Lordship then was) said: (SCC p.221, para 23)

"23. Counsel on behalf of the respondent submitted that an election petition could not be dismissed by reason of want of material facts because Section 86 of the Act conferred power on the High Court to dismiss the election petition which did not comply with the provisions of Section 81, or Section 82 or Section 117 of the Act. It was emphasised that Section 83 did not find place in Section 86. Under Section 87 of the Act every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. A suit which does not furnish cause of action can be dismissed."

20. The issue was again dealt with by this Court in *Azhar Hussain Vs. Rajiv Gandhi*. Referring to earlier pronouncements of this Court in *Samant N. Balkrishna and Udhav Singh Vs. Madhav Rao Scindia* wherein it was observed that the omission of a single material fact would lead to incomplete cause of action and that an election petition without the material facts is not an election petition at all, the Bench in *Azhar Hussain Case* held that all the facts which are essential to clothe the petition with complete cause of action must be pleaded and omission of even a single material fact would amount to disobedience of the mandate of Section 83(1)(a) of the Act and an election petition can be and must be dismissed if it suffers from any such vice."

17. The petition invokes Section 100(1)(d)(iv) of the Act. The sine qua non for the said provision to come into play is that the result of the election, in so far as it concerns a returned candidate, has been materially affected by any non-compliance with the provisions of the Constitution or of the Act or any Rules or orders made under the Act. In the entire petition, the only non-compliance, which is alleged, is that of guideline/instruction 15.30(d) of the Handbook for RO issued by the ECI in February 2019. Concededly, the averment that due to the alleged non-compliance with the said guideline/instruction the result of respondent 3 is materially affected, is absent. Shri N.B. Rathod, the learned Counsel for the petitioner would submit that an averment that the election is void, is sufficient compliance with the provisions of Section 100 of the Act and that it was wholly unnecessary to specifically aver that the result of the election is materially affected. Shri N.B. Rathod, learned Counsel would submit that an averment that the result of the election is materially affected is not a ritualistic formality and the absence thereof is not fatal to the maintainability of the petition. This submission shall be considered at a later stage in the judgment.

18. In *Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and Another*, the Supreme Court articulates that the instructions contained in the Handbook for RO issued by the ECI bind the RO. The relevant observations of the Hon'ble Supreme Court read thus :

"32. It is a settled legal proposition that the instructions contained in the Handbook for Returning Officer are issued by the Election Commission in exercise of its statutory functions and are therefore, binding on the Returning Officers. Such a view stands fortified by various judgments of this Court in Ram Sukh v. Dinesh Aggarwal, and Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil. Instruction 16 of the Handbook deals with cases as to when the ballot is not to be rejected. The Returning Officers are bound by the Rules and such instructions in counting the ballot as has been done in this case."

19. In *Durai Muthuswami vs. N. Nachiappan and Ors.*, (1973) 2 SCC 45, the Hon'ble Supreme Court was called upon to examine the correctness of the judgment of the High Court whereby the election petition was dismissed on the ground that there was no allegation in the election petition that the result had been materially affected as a result of improper acceptance of the nomination form of the elected candidate. The Hon'ble Supreme Court noted that there were only two contesting candidates, and then proceeded to observe that if the allegation that the nomination form of the elected candidate is improperly accepted is proved, there can be no dispute that the result of the election was materially affected. The Hon'ble Supreme Court further articulates that if there were to be more than two candidates,

a question would arise as to what would have happened to the votes which had been cast in favour of the candidate whose nomination had been improperly accepted in which even it would be necessary for the person challenging the election not merely to allege but also to prove that the result of the election had been materially affected by improper acceptance of the nomination form. The observation of the Hon'ble Supreme Court that "materially affected" is not a formula that has got to be specified but it is an essential requirement that is contemplated and the further observation that law does not contemplate a mere repetition of a formula will have to be understood in the context and backdrop of the factual matrix. In my considered view, the effect of the omission to aver that the election result is materially affected will depend on the facts of the petition. In a given case, akin to the factual matrix in *Durai Muthuswami vs. N. Nachiappan and Ors.*, it may be obvious and an irresistible conclusion that if the allegations on which the challenge to the election is found substantiated, the result of the election shall be materially affected. Save and except such or similar factual matrix, the failure to aver that the the result of the election is materially affected shall be fatal. In any event, unless it is proved, as a fact, that the result is materially affected, non-compliance with the instructions contained in the Handbook issued by the ECI would not render the election void.

20. The Conduct of Elections Rules, 1961 ("Rules" for short) and in particular, Chapter-II which deals with voting by EVM may now be considered.

21. Rule 49-A of the Rules provides that every EVM shall have a control unit and a balloting unit and shall be of such design/s as may be approved by the Election Commission. Proviso to Section 49-A reads thus:

"Provided that a printer with a drop box of such design, as may be approved by the Election Commission, may also be attached to a voting machine for printing a paper trail of the vote, in such constituency or constituencies or parts thereof as the Election Commission may direct."

22. Rule 49-B of the Rules deals with preparation of voting

machine by the RO and significantly provides, *inter alia*, that the RO shall set the number of contesting candidates and close the candidate set section in the control unit and secure it with his seal and the seals of such contesting candidates or their election agents present as are desirous of affixing the same.

23. Section 49-E of the Rules reads thus :

"49-E. Preparation of voting machine for poll.—(1) *The control unit and balloting unit of every voting machine used at polling station, [and the printer for paper trail where used,] shall bear a label marked with—*

- (a) *the serial number, if any, and the name of the constituency;*
- (b) *the serial number and name of the polling station or stations as the case may be;*
- (c) *the serial number of the unit; and*
- (d) *the date of poll.*

(2) *Immediately before the commencement of the poll, the presiding officer shall demonstrate to the polling agents and other persons present that [no vote has been already recorded in the voting machine and it bears the label referred to in sub-rule (1), and where the printer for trail is used that the drop box of the printer is empty.]*

(3) *A paper seal shall be used for securing the control unit of the voting machine, and the presiding officer shall affix his own signature on the paper seal and obtain thereon the signature of such of the polling agents present as the desirous of affixing the same.*

(4) *The presiding officer shall thereafter fix the paper seal so signed in the space meant therefor in the control unit of the voting machine and shall secure and seal the same.*

(5) *The seal used for securing the control unit shall be fixed in such manner that after the unit has been sealed, it is not possible to press the "result button" without breaking the seal.*

(6) *The control unit shall be closed and secured and placed in full view of the presiding officer and the polling agents and the balloting unit placed in the voting compartment.*

(7) *Where the printer for paper trail is used, the printer shall also be kept along with the balloting unit in the voting compartment and shall be connected to the electronic voting machine in the manner as directed by the Election Commission.]"*

24. Section 49-L of the Rules prescribes the procedure for voting by voting machines and *inter alia* provides that before permitting a elector to vote, the polling officer shall record the electoral roll number of the elector as entered in the marked copy of the electoral roll in a register of voters in Form 17-A and the signature or thumb-impression of the elector shall be obtained on the said register of voters.

25. Section 49-MA of the Rules prescribes the procedure in case of complaint about particulars printed on paper slip and the said provision reads thus :

“49-MA. Procedure in case of complaint about particulars printed on paper slip. (1) Where printer for paper trail is used, if an elector after having recorded his vote under rule 49-M alleges that the paper slip generated by the printer has shown the name or symbol of a candidate other than the one he voted for, the presiding officer shall obtain a written declaration from the elector as to the allegation, after warning the elector about the consequence of making a false declaration.

(2) If the elector gives the written declaration referred to in sub-rule (1), the presiding officer shall make a second entry related to that elector in Form 17-A, and permit the elector to record a test vote in the voting machine in his presence and in the presence of the candidates or polling agents who may be present in the polling station, and observe the paper slip generated by the printer.

(3) If the allegation is found true, the presiding officer shall report the facts immediately to the returning officer, stop further recording of votes in that voting machine and act as per the direction that may be given by the returning officer.

(4) If, however, the allegation is found to be false and the paper slip so generated under sub-rule (1) matches with the test vote recorded by the elector under sub-rule (2), then, the presiding officer shall

- (i) make a remark to that effect against the second entry relating to that elector in Form 17-A mentioning the serial number and name of the candidate for whom such test vote has been recorded;
- (ii) obtain the signature or thumb impression of that elector against such remarks; and
- (iii) make necessary entries regarding such test vote in item in Part I of Form 17-C.]”

26. The next relevant Rule is 49-S of the Rules which reads thus :

“49-S. Account of votes recorded. — (1) The presiding officer shall at the close of the poll prepare an account of votes recorded in Form 17-C and enclose it in a separate cover with the words “Account of Votes Recorded” superscribed thereon.

(2) The presiding officer shall furnish to every polling agent present at the close of the poll a true copy of the entries made in Form 17-C after obtaining a receipt from the said polling agent therefor and shall attest it as a true copy.”

27. Rule 49-T of the Rules deals with sealing of voting machine after poll and the polling agents present at the polling station are permitted to affix their seals. The said provision reads thus :

“49-T. Sealing of voting machine after poll.—(1) As soon as practicable after the closing of the poll, the presiding officer shall close the control unit to ensure that no further votes can be recorded and shall detach the balloting unit from the control unit [and from the printer, where printer is also used, so however, that the paper slips contained in the drop box of the printer shall remain intact.]

(2) [The control unit, the balloting unit and the printer, where it is used, shall] thereafter be sealed, and secured separately in such manner as the Election Commission may direct and the seal used for securing them shall be so affixed that it will not be possible to open the units without breaking the seals.

(3) The polling agents present at the polling station, who desire to affix their seals, shall also be permitted to do so.”

28. Rule 49-U of the Rules provides that the marked copy of the electoral roll, the register of voters in Form 17-A, the cover containing the tendered ballot papers and the list in Form 17-B and the list of challenged votes shall be kept in a sealed packet and each part shall be sealed not only with the seal of the presiding officer but also with the seal either of the candidate or of his election agent or polling agent who may be present at the polling station and who may desire to affix his seal thereon.

29. Rule 49-V of the Rules provides for transmission of voting machines etc. to the RO.

30. Chapter V of the Rules deals with counting of votes and it would be relevant to reproduce Rule 63 dealing with recount of votes, which reads thus :

“63. Re-count of votes.—(1) After the completion of the counting, the returning officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same.

- (2) *After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to re-count the votes either wholly or in part stating the grounds on which the demands such re-count.]*
- (3) *On such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.*
- (4) *Every decision of the returning officer under sub- rule (3) shall be in writing and contain the reasons therefor.*
- (5) *If the returning officer decides under sub-rule (3) to allow a re-count of the votes either wholly or in part, he shall—*
 - (a) *do the re-counting in accordance with [rule 54-A,] rule 56 or rule 56-A, as the case may be;*
 - (b) *amend the result sheet in Form 20 to the extent necessary after such re-count; and*
 - (c) *announce the amendments so made by him.]*
- (6) *After the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule (5), the returning officer shall complete and sign the result sheet in Form 20 and no application for a re-count shall be entertained thereafter:*

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule (2). ”

31. The scheme of Rule 63 is that the RO shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same and after such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the RO to re-count the votes either wholly or in part stating the grounds on which the demands such re-count.

32. Rule 64 of the Rules deals with declaration for result of election and Rule 66 provides for grant of certificate of election to the returned candidate. The RO is tasked with the duty to declare the result of the election and grant of certificate of election to the returned candidate.

33. Rule 66-A of the Rules provides for counting of votes where EVMs have been used and provides that Rules 55-C, 56-C, 56-D and 57-C shall apply in lieu of Rules 55, 56 and 57.

34. Rule 55-C of the Rules reads thus :

“55-C. Scrutiny and inspection of voting machines.—(1) *The returning officer may have the control units of the voting machines used at more than one polling station taken up for scrutiny and inspection and votes recorded in such units counted simultaneously.*

(2) *Before the votes recorded in any control unit of voting machine are counted under sub-rule (1), the candidate or his election agent or his counting agent present at the counting table shall be allowed to inspect the paper seal and such other vital seals as might have been affixed on the unit and to satisfy themselves that the seals are intact.*

(3) *The returning officer shall satisfy himself that none of the voting machines has in fact been tampered with.*

(4) *If the returning officer is satisfied that any voting machine has in fact been tampered with, he shall not count the votes recorded in that machine and shall follow the procedure laid down in section 58, or section 58-A or section 64-A, as may be applicable in respect of the polling station or stations where that machine was used. ”*

Rule 56-C of the Rules reads thus :

“56-C. Counting of votes.—(1) *After the returning officer is satisfied that a voting machine has in fact not been tampered with, he shall have the votes recorded therein counted by pressing the appropriate button marked “Result” provided in the control unit whereby the total votes polled and votes polled by each candidate shall be displayed in respect of each such candidate on the display panel provided for the purpose in the unit.*

(2) *As the votes polled by each candidate are displayed on the control unit, the returning officer shall have,-*

(a) *the number of such votes recorded separately in respect of each candidate in Part II on Form 17-C;*

[Provided that the test vote recorded, if any, for a candidate, as per item 5 in Part I of Form 17-C, shall be subtracted from the number of votes recorded for such candidate as displayed on the control unit.]

(b) Part II of Form 17-C completed in other respects and signed by the counting supervisor and also by the candidates or their election agents or their counting agents present; and

(c) corresponding entries made in a result sheet in Form 20 and the particulars so entered in the result sheet announced."

Rule 56-D of the Rules read thus :

"56-D. Scrutiny of paper trail.—(1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.

(2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.

(3) Every decision of the returning officer under sub- rule (2) shall be in writing and shall contain the reasons therefor.

(4) If the returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall —

(a) do the counting in the manner as may be directed by the Election Commission;

(b) if there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in Form 20 as per the paper slips count;

(c) announce the amendments so made by him; and

(d) complete and sign the result sheet.]"

Rule 57-C of the Rules reads thus :

"57-C. Sealing of voting machines.—(1) After the result of voting recorded in a control unit has been ascertained candidate-wise and entered in Part II of Form 17-C and Form 20 under rule 56-C, the returning officer shall reseal the unit with his seal and the seals of such of the candidates or their election agents present who may desire to affix the seals thereon so however that the result of voting recorded in the unit is not obliterated and the unit retains the memory of such result [and where printer for paper trail is used, the returning officer shall seal the paper slips in such manner, as may be directed by the Election Commission].

(2) The control unit [and the paper slips] so sealed shall be kept in specially prepared boxes on which the returning officer shall record the following particulars, namely:—

(a) the name of the constituency;

(b) the particulars of polling station or stations where the control unit has been used;

(c) serial number of the control unit; [and printer wherever used];

(d) date of poll; and

(e) date of counting;

(ii) the provisions of rules 60 to 66 shall, so far as may be, apply in relation to voting by voting machines and any reference in those rules to,

(a) ballot paper shall be construed as including a reference to such voting machine;

(b) any rule shall be construed as a reference to the corresponding rule in Chapter II of Part IV or, as the case may be, to rule 55-C or 56-C or 57-C]."

35. It is manifest from the statutory scheme that every precaution is taken to ensure the purity and sanctity of the electoral process on which bedrock rests the expression of the will of the electorate in a democratic country. The Hon'ble Supreme Court of India has intervened to supplement the statutory schemes by issuing certain directions *inter alia* a direction that the EVMs in respect of which VVPAT paper slips is to be subjected to physical scrutiny is increased from 1 to 5. (see paragraph of the 10 of the decision of the Hon'ble Supreme Court in **Writ Petition (C) 273 of 2019, N. Chandrababu Naidu and Others vs. Union of India and Another**)

36. Shri Sunil Manohar, the learned Senior Counsel for respondent 3 has launched a frontal assault on the maintainability of the petition and the quality or rather the lack thereof, of the pleadings. Shri Sunil Manohar, learned Senior Counsel would submit that the petition does not disclose any cause of action and is not a petition as is envisaged under Section 80 of the Act.

37. Shri Sunil Manohar, learned Senior Counsel submits that the edifice of the petition is constructed on the alleged violation of instruction 15.30 (d) of the Handbook for the RO published by the ECI and even if it is assumed that non-compliance with the instructions issued by the ECI would attract the provisions of Section 100 (1)(d)(iv) of the Act, the petitioner has failed to aver muchless demonstrate, even *prima facie*, that the alleged non-compliance has materially affected the result of the election of respondent 3.

38. Shri Sunil Manohar, learned Senior Counsel would submit that the only allegation in the petition is that there was a difference of 62 votes between the votes polled and the votes counted. Shri Sunil Manohar, learned Senior Counsel would submit that in the entire petition there is not even an attempt to disclose the source of the information or to disclose the material facts which would enable the elected candidate to make sense of the bald allegation that there was a difference in the votes counted and the votes polled.

39. Shri Sunil Manohar, learned Senior Counsel would submit that in Election Petition 5/2019, which is heard alongwith this petition, a chart is produced which purports to record the difference between the votes polled and the votes counted and qua the Gadchiroli-Chimur Constituency which is at serial 5 in the chart, the difference in votes polled and counted is recorded as 62. Shri Sunil Manohar, learned Senior Counsel would submit that the averment in Election Petition 5/2019 is that the data in the chart is extracted from the data made available by the ECI. Shri Sunil Manohar, learned Senior Counsel would submit that apart from the fact that a similar averment is absent in the instant petition and the chart is not annexed, even if such an averment were to be made, the same would be absolutely irrelevant.

40. Shri Sunil Manohar, learned Senior Counsel would submit that the recording of votes polled and the votes counted is statutorily regulated and governed and the ECI has no role to play nor is the ECI mandated to declare the number of votes polled and counted. Shri Sunil Manohar, learned Senior Counsel would submit, that apart from the fact that the data extracted has no sanctity, it is not even the case of the petitioner that the number of votes polled and counted were wrongly recorded or declared by the authorities statutorily entrusted and tasked with the duty to record and declare the polled and counted votes.

41. Shri Sunil Manohar, learned Senior Counsel emphasizes that the entire process from preparation of the EVM till the counting and declaration of votes is governed by statutory rules and that the petitioner has not alleged breach of any of the rules. Shri Sunil Manohar, learned Senior Counsel would submit that there is no averment in the petition that the votes recorded in Form 17-C, Part-I and the votes displayed on the control unit and the number of valid votes recorded in Form 17-C, Part-II did not tally. Shri Sunil Manohar, learned Senior Counsel would further submit that neither the petitioner nor his polling agent exercised the right to test count the printed paper trail.

42. Shri Sunil Manohar, learned Senior Counsel would submit that instruction 15.30(d) of the Handbook, the non-compliance of which is the edifice of the challenge to the election, has no relevance or applicability to the factual matrix.

43. Shri Sunil Manohar, learned Senior Counsel would emphasize that the RO is obligated to make a reference to the ECI only if the total votes polled in the EVM does not tally with the total votes polled recorded in Form 17-C. Shri Sunil Manohar, learned Senior Counsel would submit that in the absence of an averment in the petition that the total votes polled and recorded in the EVM did not tally with the total votes polled and recorded in Form 17-C, the reference to the said instruction 15.30(d) is irrelevant and misconceived.

44. Shri Sunil Manohar, learned Senior Counsel would conclude with the submission that the election petition is an apology for a petition and merits rejection in the absence of cause of action inasmuch as not a single material fact is pleaded and what is pleaded is not only immaterial but also irrelevant.

45. Shri N.B. Rathod, learned Counsel for the petitioner did make a valiant effort to hold the fort and to resist fervent plea to dismiss the petition at the threshold.

46. Shri N.B. Rathod, learned Counsel would submit that the RO has acted in gross disregard to the provisions of Section 66 of the Act which empowers the RO to declare the result provided there is no contrary direction issued by the ECI. Shri N.B. Rathod would submit that the act of declaration of result without making a reference to the ECI would render the entire process including the declaration of result void and that the election result is materially affected is the logical and irresistible conclusion. Shri N.B. Rathod would submit that having pleaded the foundational facts and having asserted that the election is void, it is not necessary to further aver as a ritualistic formality that the result of the election is materially affected.

47. The thrust of the submission canvassed by Shri N.B. Rathod, learned Counsel, is that in the teeth of the averment in the petition that according to the data available on the website of the ECI, there was a discrepancy of 62 votes in the

votes polled and the votes counted, and that in view of the discrepancy, the RO was obligated to make a reference to the ECI and to withhold the declaration of result, the petition does disclose a cause of action which merits a trial. Shri N.B. Rathod would submit that the authenticity or otherwise of the data extracted from the petitioner from the website of the ECI would be tested in the trial and the petition cannot be rejected under Order VII Rule 11 of the Code or any provision of the Act without providing the petitioner an opportunity to adduce evidence.

48. The seminal issue is whether the election petition discloses a cause of action as would warrant a trial. The answer must clearly be in the negative for reasons spelt out infra.

49. The petition alleges that the data available with the ECI reveals a difference of 62 votes in the votes polled and the votes counted. The only averment in the petition is that in view of the discrepancy, as is revealed from the data released by the ECI, the RO was obligated to refer the issue of discrepancy to the ECI and that the declaration of the election result is, therefore, void. I find considerable substance in the submission of Shri Sunil Manohar, learned Senior Counsel, that the petitioner has not stated a single material fact and that what is stated is immaterial and irrelevant.

50. Shri N.B. Rathod, learned Counsel was not in a position to demonstrate that the ECI was statutorily mandated by any provision of the Act or the Rules framed thereunder to declare the votes polled and votes recorded. *Au contraire*, the statutory scheme is that the electoral roll number of the elector is recorded in Form 17-A on which the signature or the thumb impression of the elector is obtained. The list of tendered votes is maintained in Form 17-B as is the mandate of Rule 49-P of the Rules. In the context of the controversy, the pivotal record is Form 17-C. Rule 49-S of the Rules mandates that the Presiding Officer shall at the close of the poll prepare an account of votes recorded in Form 17-C and shall furnish to every polling agent present at the close of the poll a true copy of the entries made in Form 17-C. Notably, it is not the case of the petitioner that the polling agent was not provided with a true copy of the entries made in Form 17-C.

51. Part-I of Form 17-C is reproduced hereunder :

"FORM 17-C

[See rules 49-S and 56-C(2)]

PART I

ACCOUNT OF VOTES RECORDED

Election to House of the People/Legislative Assembly of the State/Union
territory. from constituency.

No. and Name of Polling Station.....

Identification No. of Voting Control Unit.....

Machine used at the Polling Station:..... balloting Unit.....

Printer (if used).....

1. Total No. of electors assigned to the Polling Station
2. Total No. of voters as entered in the Register for Voters (Form 17-A) .
3. No. of voters deciding not to record votes under rule 49-O
4. No. of voters not allowed to vote under rule 49-M.
5. Test votes recorded under rule 49-MA(d) required to be deducted —

(a) total number of test votes to be deducted:	Total No. in Form 17-A	SI.No.(s) of elector(s)
--	---------------------------	-------------------------

(b) candidate(s) for whom test vote(s) cast:	SI.No. candidate	Name of Votes	No. of
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.....
.....

6. Total number of votes recorded as per voting machine.....

7. Whether the total No. of votes as shown against item 6 tallies with the total No. of voters as shown against item 2 minus Nos. of voters deciding not to record votes as against item 3 minus No. of Voters as against item 4 (i.e., 2-3-4) or any discrepancy noticed.....

8. No. of voters to whom tendered ballot papers were issued under rule 49-P
9. No. of tendered ballot papers.

	Total	SI.No. From	To
(a) received for use			
(b) issued to electors			
(c) not used and returned			

10. Account of papers seals

		Signature of polling agents
1. Paper seals supplied for use:	Total No..... SI. No. from....to.....	1.....
2. Paper seals used:	Total No..... SI. No. (s).....	2.....
3. Unused paper seals returned to: Returning Officer:	Total No..... SI. No.(s).....	3.....
4. Damaged paper seal, if any:	Total No..... SI. No. (s)	4..... 5..... 6.....

Date.....

Place.....

Signature of Presiding Officer

Polling Station No.....”

Part-I of Form 17-C records every relevant information including the total number of votes recorded as per the voting machine and Part-I is to be signed not only by the Presiding Officer of the Polling Station, but also by the polling agents. It is not the case of the petitioner that Part-I of Form 17-C which records the number of votes was not made available to the polling agents.

52. Rule 56-C of the Rules further provides that the votes polled by each candidate shall be separately recorded in Part-II of Form 17-C which shall be signed by the counting supervisor and by the candidates or their election or counting agents present and that corresponding entries shall be made in a result sheet in Form 20 and the particulars entered in the result sheet announced.

53. Part-II of Form 17-C is reproduced herein below :

**"PART II
RESULT OF COUNTING**

Sl. No. of candidate	Name of candidate	Number of votes as displayed on control unit	Number of test votes to be deducted as per item 5 of Part I.	Number of valid votes. (3-4)
(1)	(2)	(3)	(4)	(5)
1.				
2.				
3.				
4.				
5.				
6.				

Total

Whether the total Nos. of votes shown above tallies with the total number of votes shown against item 6 of Part I or any discrepancy noticed between the two totals.

Place

Date

Signature of Counting Supervisor

Name of candidate/election agent/counting agent

Full signature

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

Place

Date

.....
Signature of Returning Officer.]]

54. It is not even the case of the petitioner that his polling or counting agent was not made available Part-II of Form 17-C nor is it stated in the petition that there was a discrepancy in the votes recorded in Form 17-C, Part-I and Form 17-C, Part-II.

55. In the context of the substratum of the challenge, it was incumbent for the petitioner to aver which rule was breached. Every relevant fact is conspicuously absent in the petition. The petition makes no reference, to muchless disclosure of the votes polled and the votes counted, which were recorded in accordance with the statutory provisions. The petition does not disclose whether any protest was lodged by the petitioner or his election or polling or counting agent qua the electoral process. The petition makes no reference to muchless explain the failure of the petitioner to exercise the right to produce and demand a recount which right is enshrined in Rule 49-MA and Rule 63 of the Rules.

56. In my considered view, not a single material fact is stated and the petition falls foul of the mandatory provisions of Section 83(1) of the Act. The irresistible conclusion is that no cause of action is made out as would merit full-fledged trial.

57. I am further not persuaded to accept the submission of Shri N.R. Rathod, learned Counsel, that it was not necessary to plead that the result of the election is materially affected. In the factual matrix, the failure of the petitioner to plead that the election result is materially affected, is fatal. The petitioner alleges non-compliance of the instructions contained in the Handbook for RO issued by the ECI. I have already held that the instruction 15.30(d) do not come into play. Assuming, *arguendo*, that the said instruction did have some relevance, it was necessary for the petitioner to plead and then prove that the failure of the RO to refer the issue of the alleged discrepancy to the ECI has

materially affected the result of the election. Shri N.B. Rathod relies on the decision of *Durai Muthuswami vs. N. Nachiappan and Ors.* which is already considered supra. The next decision which is pressed into service by Shri N.R. Rathod is *Jagjit Singh vs. Dharam Pal Singh and Ors., 1995 Supp.(I) SCC 422*. The facts considered by the Hon'ble Supreme Court were that the petitioner lost by a margin of 80 votes and the averment in the petition was that valid votes of the petitioner numbering more than 80 were improperly rejected. In the facts of that case, the Supreme Court has held that it is obvious that if the petitioner succeeds in establishing his case as set out in the election petition, the result would be materially affected. The relevant observations of the Hon'ble Supreme Court read thus :

*“23. The trial Judge has held that since there is no averment in the petition that the result of the election was materially affected by improper rejection or acceptance of votes, it is devoid of cause of action. We are unable to agree that the absence of such an averment in the facts of this case is fatal. As pointed out by this Court, there may be cases where the obvious conclusion to be drawn from the circumstances is that the result of the election has been materially affected and that Section 100(1) (d) of the Act is not intended to provide a convenient technical plea in a case where there can be no dispute at all about the result of the election being materially affected by the alleged infirmity. [See: *Durai Muthuswami v. N. Nachiappa MANU/SC/0246/1973 : (1974) 1 SCR 40*]. In the present case, the appellant in the election petition has stated that he has lost by a margin of 80 votes only. From the various averments in the election petition it was evident that the number of valid votes of the appellant which are alleged to have been improperly rejected is much more than 80. From the averments contained in the election petition it is thus obvious if the appellant succeeds in establishing his case as set out in the election petition the result of this election, insofar as it concerns the returned candidate, would be materially affected”.*

58. The next decision on which Shri N.B. Rathod, learned Counsel relies is *Mairembam Prithviraj and Ors. vs. Pukhrem Sharatchandra Singh and Ors., (2017) 2 SCC487*, which is rendered in the context of improper acceptance of the nomination form of the elected candidate. The relevant observations of the Supreme Court read thus :

*“23. Mere finding that there has been an improper acceptance of the nomination is not sufficient for a declaration that the election is void under Section 100(1)(d). There has to be further pleading and proof that the result of the election of the returned candidate was materially affected. But, there would be no necessity of any proof in the event of the nomination of a returned candidate being declared as having been improperly accepted, especially in a case where there are only two candidates in the fray. If the returned candidate's nomination is declared to have been improperly accepted it would mean that he could not have contested the election and that the result of the election of the returned candidate was materially affected need not be proved further. We do not find substance in the submission of Mr. Giri that the judgment in *Durai Muthuswami* (supra) is not applicable to the facts of this case. The submission that *Durai Muthuswami* is a case of disqualification under Section 9-A of the Act and, so, it is not applicable to the facts of this case is also not correct. As stated supra, the election petition in that case was rejected on the ground of non-compliance of Section 100 (1) (d). The said judgment squarely applies to this case on all fours. We also do not find force in the submission that the Act has to be strictly construed and that the election cannot be declared to be void under Section 100(1) (d) without pleading and proof that the result of the election was materially affected. There is no requirement to prove that the result of the election of the returned candidate is materially affected once his nomination is declared to have been improperly accepted.”*

59. In my considered view, as observed supra, whether it would be necessary to plead that the result of the election is materially affected would depend on the factual matrix and the decisions which are pressed into service by Shri N.B. Rathod, learned Counsel, do not indicate to the contrary.

60. The application under Order VII Rule 11(a) of the Code is allowed.

61. The petition is dismissed.

62. The security deposit is forfeited.

JUDGE